charter and thus before any act of performance or expense by the plaintiff (App. 2-3).

(b) The plaintiff undertook another charter which began at the same time as the cancelled charter (App. 9).

(c) The plaintiff knew that this substitute charter would result in a loss, but it was undertaken to return the vessel to the United States where the crew's articles were to expire in October (A. 52-3a).

(d) If the cancelled charter had been performed, the vessel would have ended up in Korea and forced to return in ballast at considerable expense because there were no outbound cargoes in Korea (A. 22a).

The Decision Below

On the basis of these undisputed facts, the Court below evolved a novel and unprecedented rule of damages, namely, that the plaintiff was entitled to recover not only the value of performance of the charter, i.e., the prospective profit it would have realized upon full performance, but also certain operating or overhead expenses of the vessel, such as crew's wages, for the estimated time it would take to perform the charter. This result was based on the assumption that these expenses would have been incurred "during a period when the vessel is idle." This assumption was made even though the vessel was not idle and was based on a further assumption that the overhead cost of a vessel performing a voyage would be the same as the expenses of maintaining an idle ship.

The fallacy of this assumption that the expense of maintaining an idle ship is the same as when she is on a voyage is sharply pointed up in the dissent of Chief Judge Lumbard, who stated (App. 16-7):

> "* * * Judge Friendly assumes that a shipowner such as the plaintiff ordinarily bears overhead costs in an amount equal to the expenses of maintaining an idle ship. The facts of this very case, however, indicate that this is not true * * *. It is, therefore, erroneous to distinguish between the expenses incurred in port and the costs attributable to travel. To compute 'savings' by hypothesizing expenses had the ship not moved from its dock is to adopt an unrealistic contrast."

Chief Judge Lumbard, in his dissenting opinion, pointed out that not only was this hypothetical allocation of in port and voyage expenses confusing, uncertain and totally irrelevant, but also that the amount of the award as fixed by the majority exceeded the total of the prospective profit of the cancelled charter and the loss sustained by the owner in performing another charter prorated for the period of the cancelled charter (App. 15, 18).

To assist the Court in analyzing the complex computation of damages in the award below, and to illustrate that plaintiff not only recovered its prospective profit but also recovered expenses where there was no act of performance or expense incurred before repudiation, we set out below the following tables. One (A) is the Court's computation, and the other (B) our breakdown showing that plaintiff recovered more than double its anticipated profit.

(A)

Gross freight to be received on performance of the cancelled charter		$121,740.00
Total cost of performance	$ 86,784.50	
Less operating cost of vessel for period of performance	58,135.00	
Particular voyage expenses such as fuel, etc.		28,649.50
Difference between gross freight and expenses exclusive of operating cost of vessel		93,090.50
Less part of operating cost estimated by court to have been recouped from substitute charter		19,454.82
Total recovery		$ 73,635.68

(B)

Gross freight	$121,740.00	
Less total cost of performance of charter	86,784.50	
Net profit of vessel owner		34,955.50
Plus operating cost of vessel during period of performance	58,135.00	
Less part of operating cost estimated by court to have been recouped from substitute charter	19,454.82	38,680.18
Total recovery		$ 73,635.68

The decision below is a radical departure from the rule of damages in similar cases which up to now was believed to be well settled, and is in conflict with decisions of this Court as well as those of other circuits including the Fourth and Ninth Circuits. Review by this Court is clearly called for.

1. This conflict is evident from the authorities which hold that the measure of damages for a total breach of a charter is the difference between the gross freight and the cost of full performance. In *The Gazelle and Cargo*, 128 U. S. 474; 9 S. Ct. 139, 142, this Court stated:

> "* * * a shipowner, * * * who is prevented from performing a voyage by a wrongful act of the charterer, is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it."

There the owner of a sailing schooner entered upon performance of the charter by loading the cargo. The vessel was then forced to remain at the loading port with the cargo on board during "the time required to perform the contractual voyage" because the charterer failed to designate a safe port of discharge. As a consequence of charterer's default, the vessel owner laid out all the expenses that would have been incurred to fully perform the charter. In view of this, coupled with the fact that the expenses of the sailing schooner "in port were not less than on the voyage", this Court held the shipowner was entitled to be paid the gross freight without any deduction. This result is consistent with the above quoted general rule of damages because the vessel owner there actually incurred all the expenses that a voyage would have incurred. In the instant case, there was no act of per-

formance or expense incurred prior to or subsequent to repudiation. Nor was the vessel here idle during the period fixed for performance. Therefore, plaintiff's recovery under this rule (gross freight less what it would have cost him to earn it) should be limited to its anticipated net profit.

The Potomac, 105 U. S. 630 (1881) also supports the aforesaid established measure of damages. There, the Court, in granting a recovery for the loss of use of a vessel while laid up for repairs because of a collision, stated (pp. 631-2):

> "When there is a market price for such use, that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it; *in no event can more than the net profits be recovered by way of damages;* and the burden is upon the libellant to prove the extent of the damages actually sustained by him." (Emphasis supplied.)

The Court of Appeals in the various circuits prior to the decision for which review herein is sought have followed the aforesaid measure of damages enunciated in *The Gazelle and Cargo* case, *supra*. The Court of Appeals for the United Circuit in *Leblond* v. *McNear*, 104 Fed. 826, aff'd (9 Cir.) 123 Fed. 384, expressly approved that rule of damages stated by the District Court (p. 830):

> "The measure of damages in this class of actions seems to be well settled. In an action against the charterer of a ship for a *total breach* of his contract, the measure of damages is the net amount that would have been earned by the vessel under the charter sued on, less the net amount earned, or which might with reasonable diligence have been

earned, by the vessel during the time required for the performance of the voyage named in such contract of charter."

The Court of Appeals for the Fourth Circuit in *Ainesworth Coal & Iron Co.* v. *Trafikaktiedolaget Grangesberg Oxelosund*, 287 Fed. 291, at 296, similarly agreed that the above quoted statement expressed the correct rule of damages in this type of case.

Up to the instant decision the Court of Appeals for the Second Circuit was in accord with the rule expressed in *Leblond* v. *McNear*, *supra*.

See:

Venus Shipping Co. v. *Wilson* (2 Cir.), 152 Fed. 170;

United Transportation Co. v. *Berwind-White Co.* (2 Cir.), 13 F. 2d 282.

The same rule of damages is applied in England.

See:

Smith v. *McGuire* (1858), 3 Hurl. & N. 554;

Scrutton on Charterparties and Bills of Lading, 16th Ed., p. 438.

In the *Venus Shipping* case, *supra*, the vessel was idle in port for nine days after the breach and before she started to perform a substitute charter. Yet nothing was allowed for her operating expenses during that idle period in excess of the net profits on a full cost basis that would have been earned under the broken charter.

In the *United Transportation* case, *supra*, the vessel was idle in port for five days awaiting performance of the substitute charter. The record reveals that the commissioner did not add the operating expense for those five days to

the allowance of net profit for the cancelled voyage. However, since the owner was given a credit for the profit realized from the substitute charter, the commissioner reduced the amount of this credit by the operating expense incurred during those five days. In the instant case, there were no idle days between the time fixed for the start of the cancelled charter and the beginning of the substitute charter. Accordingly, there would be no requirement or reason for a deduction because of an idle vessel as in the *United Transportation* case.

2. The decision below is in conflict with the rule of damages for breach of contracts other than those of a maritime nature. This is clear from decisions of this Court and those of other circuits.

The measure of damages in breach of contract cases generally as laid down by this Court is the net profit anticipated on the contract plus *actual* expenses incurred in performance. *United States* v. *Behan*, 110 U. S. 338.

In *Smith* v. *Onyx Oil and Chemical Company* (3 Cir.) 218 F. 2d 104, 112, the Court of Appeals, in an action for breach of contract, held that the plaintiff could not recover "expenses in getting ready to perform" the contract in addition to the prospective profits, stating:

> "That exception is that the plaintiff cannot have both profits and expenses. This relates to the item of $3,758.79 which Smith claimed as expenses in getting ready to perform this contract. This, we think, is not recoverable. If he has the profit he was to make, had the contract been performed, he cannot also have the expenses to which he was put to make that profit. That item must, therefore, be deleted from his judgment."

To the same effect is *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540, 546, where Judge Holmes stated that if the defendant were required to pay plain-

tiff's expenses incurred in anticipation of performance in addition to the difference between the contract price and the market price of merchandise which the defendant failed to deliver, it would result in "making the defendant pay twice for the same thing."

In 31 Colum. L. Rev. 1286 (1931), Professor Patterson, in his article entitled "Builder's Measure of Recovery for Breach of Contract", makes it clear that a builder is not entitled to recover overhead expenses incurred after repudiation, stating (p. 1307):

> "However, the overhead expenses, especially the salaries of supervisors, accruing after repudiation, should not be allowed. In legal theory the builder is obliged to discharge immediately all employees and officials in so far as their services are required on this particular job. The loss incurred due to their enforced idleness ensuing upon the owner's repudiation is not outlay on this job; at best it is 'consequential' damage, and as such probably cannot be recovered even in an action for breach of contract."

The author cites in support thereof, among other cases, *Globe Refining Co.* v. *Landa Cotton Oil Co., supra.*

To the same effect is 17 Yale L. J. 443, "Damages Upon Repudiation of a Contract", where it is stated (p. 444):

> "The measure of damages recoverable against him for non-performance is the value of the contract at the time for its performance, or the so-called profit of the contract. This, generally speaking, is the difference between the contract price and the cost of full performance: • • •."

The controlling decisions for an absolute breach of a non-maritime contract both in Massachusetts and in New York, where this contract was entered into, hold that in

computing the damages for the breach, the full cost of performance is deducted from the contract price. See *Long Island C. & S. Co.* v. *City of New York*, 204 N. Y. 73, 82-83; *Mt. Pleasant Stable* v. *Steinberg*, 238 Mass. 567.

II

If the measure of damages is to be predicated as though the vessel were idle in port during the period of the charter, then the damages should be based upon the provision in the charter that demurrage was payable at the rate of $1,000 per day in excess of the allowable laydays given for loading and discharge.

This rule was applied in *Watts* v. *Camors*, 115 U. S. 353. There, the broken charter party allowed fifteen days for loading and provided that after that period demurrage was payable at the rate of £50 per day. The owner tendered the vessel at the port of loading on September 11th but the charterer refused to accept her. She waited in port until October 19th, when she obtained a substitute charter. The Court allowed the owner demurrage in the sum of $5,082 for the twenty-one-day delay in port after the expiration of the laydays at the demurrage rate stipulated in the charter. This was in addition to the expense incurred to remove grain fittings which had been installed to load the cargo to be carried on the cancelled voyage.

In the case at bar, the parties agreed in the charter that demurrage was payable at the rate of $1,000 per day at loading and discharging ports in excess of the allowable laydays for loading and discharging. The Court below found that it would take 38½ days to perform the charter, and that the defendant was entitled to 10½

weather-working days to load the cargo and 8½ days for discharging it. The total laydays for which no charge could be made would be 22 days, since there were two Sundays intervening on which cargo was not required to be worked. The difference between the permitted laydays for which no charge could be made and the total time to complete the charter would be 16½ days. Thus, under the demurrage clause, the owner would have been entitled to $16,500 had the vessel remained idle in port.

The provision for payment of demurrage is liquidated damages for the ship's delay while unemployed and idle in port and the compensation payable for the ship's detention (*The Apollon*, Wheat. 362, 378; 6 L. Ed. 111). The Court below apparently overlooked this provision, for it assumed that if the vessel remained in port idle, her owner would expend for overhead and be entitled to recover $1,510 per day, which the parties stipulated would be the daily operating cost that would have been incurred in performing the cancelled charter. The record is clear, and it was admitted by plaintiff's counsel, that the "only purpose" of stipulating that operating cost "figure", as well as other items, was "merely to show what the estimated profit would have been under the Kinoshita charter" (A 48, 70-71). It certainly did not mean that we stipulated that the daily cost of the vessel while idle in port was $1,510.

Chief Judge Lumbard, in his dissenting opinion, points up the fact that the record reveals that the overhead cost is not equal to the expenses of maintaining an idle ship, and that the stipulation in respect to the overhead or operating cost of the vessel related to the expense of performing "the cancelled charter" (App. 16).

III

The defendant was entitled to a credit by reason of the favorable position of the vessel created by the substitute charter.

The majority opinion agreed that, in an action by a vessel owner for damages for breach of a charter party, the favorable position of the vessel created by a substitute charter should be taken into account, but stated that in the case at bar the defendant had failed to prove "that no cargo for the United States would have become available in late August when the cancelled charter would have been completed" (App. 10-11).

The uncontradicted evidence was that if this charter had been performed, the vessel would have been in Korea about the middle of August 1957 and would have had to return in ballast because there was no outbound cargo for the vessel in Korea.

Plaintiff's witness, Beckmann, who did the chartering for J. H. Winchester & Co., the ship's agent, admitted testifying in his examination before trial as follows (A. 22a):

> "Q. Mr. Beckmann, you had no business for this ship coming out of Korea after they had performed this charter to carry sugar from The Philippines to Korea? A. We had nothing to go back to The Philippines.
>
> Q. The ship itself would have to return in ballast to The Philippines? A. To some place.
>
> Q. To some place? A. That's right.
>
> Q. No business at Moji [Japan]? A. That is correct."

Beckmann, upon redirect examination by plaintiff's counsel, further testified (AA 6):*

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* Reference is to Appellee's Appendix to its brief in Court below.

"Q. Have you made a review of your record of the charters your firm fixed during the middle and latter half of August, 1957? A. Yes.

Q. Did your firm fix any vessels during that period? A. Yes.

Q. Mr. Beckmann, could you tell us what voyages you had fixed? A. We fixed an American vessel for an August lifting of sugar in Hawaii to the East Coast of the United States on a time charter basis."

The foregoing testimony makes it patently clear that there was no cargo in Korea for this vessel at the time the charter would have been performed, either for the United States or any other place, and that she necessarily would have had to proceed from Korea in ballast. If she could have lifted a cargo in the Philippines, the ballast voyage from Korea, upon the basis of the stipulated facts, would have cost the plaintiff $20,982.65 (Plff's Ex. 7; A 70-71a). There was no proof that a cargo for the United States would have been available to this vessel in the Philippines in August. The only evidence of available business was that a cargo of sugar had been fixed to be loaded in August in Hawaii for the United States (AA 6). If a cargo had been available for this vessel in the Hawaiian Islands for lifting in August, the ballast voyage from Korea to Hawaii would have taken an additional twenty-one days, thus increasing the credit to the defendant to $99,643.87.

Should there have been doubt as to the evidence in respect to this credit, the case should have been remanded to the District Court for further proof.

Conclusion

Each of the issues presented by the decision below is believed to involve a question of maritime as well as general law which is of such importance that it should be settled by this Court. It is accordingly urged that writ of certiorari to review the judgment of the Court below be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 14—October Term, 1960.

(Argued September 28, 1960 Decided December 14, 1960.)

Docket No. 26107

LIBERTY NAVIGATION & TRADING CO., INC.,
Plaintiff-Appellee,

—v.—

KINOSHITA & CO., LTD., TOKYO,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
TUTTLE* and FRIENDLY, *Circuit Judges.*

Defendant appeals from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, *Judge*, 178 F. Supp. 729, awarding plaintiff damages for

* Of the Fifth Circuit, sitting by designation.

breach of a voyage charter, on the ground that the award is excessive. Judgment modified.

JOHN V. LINDSAY of Webster, Sheffield & Chrystie, New York, N. Y. (Donald J. Cohn on the brief), *for Plaintiff-Appellee.*

JAMES E. FREEHILL of Hill, Betts & Nash, New York, N. Y. (Daniel J. Tobin and Melvin J. Koch on the brief), *for Defendant-Appellant.*

FRIENDLY, *Circuit Judge*:

This appeal presents an interesting question as to the measure of damages for the breach of a voyage charter. Our view differs both from that of the trial judge and from that urged by appellant.

On May 17, 1957, Liberty Navigation & Trading Co., Inc., as owner, and Kinoshita & Co., Ltd., as charterer, entered into a charter of the American steamer JOSEFINA. The vessel was to proceed to loading ports in the Philippines, there load a cargo of raw sugar in bags, "10,160 metric tons 5% more or less at owners option which the charterers bind themselves to ship," and then proceed to discharging ports in Korea. The freight was to be $12 per long ton. The JOSEFINA was required to be in the first loading port in the Philippines on or before July 10, 1957. The charterer was to load at the average rate of 1,000 metric tons per weather working day and to discharge at the average rate of 1,200 metric tons per weather working day, Sundays and holidays excepted, unless used. Loading and discharge were to be performed by the charterer at its expense; however, a separate clause, 22, provided: "Dunnage and mats, and taxes, if any, to be for Owners account."

Appendix A

On June 10, 1957, the Philippine Government having suspended the issuance of export licenses for sugar to Korea, defendant cancelled the charter. The JOSEFINA was then en route with a cargo from India to Japan. On June 21 plaintiff wrote that it regarded the notice of June 10 as a repudiation of the charter, would seek other employment for the JOSEFINA, and would hold defendant liable in damages. Plaintiff did not succeed in obtaining other cargoes within the Far East. However, by paying an indemnity of $12,000 to another vessel, plaintiff arranged a charter from the Philippines to the east coast of the United States, on what were known to be relatively unfavorable terms. The substitute charter consumed 82 days, earned freight of $152,310, and resulted in an overall loss of $71,735; however, it had the advantage, among others, of returning the JOSEFINA to the United States where she had to be in any event in October when the Articles of her crew expired. Defendant does not dispute that it is liable for breach of the charter and that plaintiff took all reasonable measures to mitigate the damages.

The first step in computing the damages was to determine the freight plaintiff would have received under the cancelled charter. Here there was a dispute as to how much sugar the JOSEFINA could have carried. The trial court found she had capacity to carry 10,145 long tons, an amount within the owner's option to take on 10,160 metric tons 5% more or less; at the agreed rate this would have yielded freight of $121,740. Appellant claims she could not have carried more than 9,539 long tons, but we accepted the judge's finding since there was a conflict of testimony and his determination can in no event be deemed clearly erroneous.

Appendix A

A much more serious controversy concerned the amount to be deducted from the freight for the expenses plaintiff would have had in performing the cancelled charter and the consideration to be given to the results of the substitute charter. As to the former, the trial judge took the view that the only expenses properly deductible from the freight under the cancelled charter were such expenses as would have been entailed in making the voyage over and above the amounts that would have had to be expended in any event to maintain the vessel for the same length of time in a foreign port. As to the second, he held that, since the substitute charter had resulted in a loss, it was not to be considered at all. From the estimated freight of $121,740 receivable under the cancelled charter he therefore deducted only $23,124, this being the sum of ship broker's commissions, port charges and dunnage that would have been payable by the vessel under the cancelled charter, and the excess of the cost of fuel for the 16½ days when the JOSEFINA would have been at sea over the fuel cost for maintaining her in port during the same period. Accordingly, he awarded damages of $98,616.

Defendant attacks the award as excessive, contending that, at least in the ordinary case, damages for the breach of a voyage charter may not be more than the excess of the freight for the voyage over the expenses of the voyage determined on a full costing basis, although they may be less than this to the extent that a substitute charter has produced profits. The plaintiff claims the award to be required by *The Gazelle and Cargo*, 128 U. S. 474 (1888). In our view the District Court overcompensated the plaintiff, but not to the extent the defendant argues.

We see no logical basis for a rule that would set the difference between the freight and the fully allocated cost

of performing the cancelled voyage as the maximum damages that could be recovered for breach of a charter where consequential damages are not established. Plaintiff points out that such a rule would provide an incentive for the breach of voyage charters when the market had fallen so that owners were offering charters at less than full costs. The damages which the law accords to the plaintiff are the value of the defendant's performance less the plaintiff's savings from being relieved of the necessity of performing on his own part. 5 Williston, Contracts (1937 ed.), pp. 3765-66. Accordingly, what must be deducted from the freight is "any saving to the plaintiff due to the non-performance of the contract." *Ibid.*, p. 3764; amounts which the plaintiff has had to pay in any event, e.g., crew wages, during a period when the vessel is idle, have not been saved. Defendant has cited no authority to support the rule of limitation which it advances. Indeed, in one of the decisions relied on by it, *United Transportation Co.* v. *Berwind-White Coal-Mining Co.*, 13 F. 2d 282 (2d Cir. 1926), this Court sanctioned a measure of damages more liberal to the owner. There the cancelled charter would have been completed in 36 days, whereas the substitute charter began five days later and ran for a longer period. The commissioner computed damages as being the profit under the broken charter determined after deducting full costs, less 31 times the daily profits under the substitute charter similarly computed, plus 5 days of ordinary expenses for keeping the vessel in port while awaiting the substitute charter. This Court sustained the commissioner's computation against attack by the charterer.

The formula in the *United Transportation* case would support the award here made by the District Court if there

had been no substitute charter; for, if the vessel is idle for the entire period, it is immaterial whether one first deducts from the freight expenses of the broken charter computed on a fully allocated basis and then adds back the expenses of maintaining the vessel in port for the same period, or deducts only the added expenses as the district judge did. However, here there was a substitute charter which, although operated at an overall loss, made some contribution to such expenses as crew hire, maintenance, etc., during the period of the broken charter. The District Court was mistaken insofar as it failed to credit defendant with the amount so contributed and thereby required defendant to reimburse plaintiff for some general expenses that plaintiff has already recovered.

Analysis of the figures of record will serve both to demonstrate this and to arrive at a proper award, bearing in mind the caution in *Venus Shipping Co.* v. *Wilson*, 152 Fed. 170 (2d Cir. 1907), that in determining damages for a broken charter "approximate accuracy is all that can be reasonably expected." Before proceeding with this analysis, we must fix the duration of the cancelled charter.

The trial judge found that the cancelled voyage would have required 37½ days, although, because of his computation of expenses on an added cost basis and his belief that the substitute charter should be disregarded, this figure does not appear to have entered into his calculations. We must first consider how long the charter in fact would have taken and, if the answer is more than 37½ days, decide whether defendant is precluded by an alleged stipulation from asserting this.

Under the charter defendant was entitled to take approximately 10¼ weather working days to load and 8½ to unload. These 18¾ days would necessarily have

included at least two Sundays on which defendant was not required to load. Addition of these brings us to a figure approximating the 21 days shown in the stipulation. However, the JOSEFINA's log book showed there was a typhoon in the Philippines which prevented any loading of cargo from 11 A. M. on July 14 to 8 A. M. on July 16. Since the JOSEFINA did not complete the discharge of her prior cargo in Japan until July 2 and could not have reached the Philippines before July 8, this typhoon would have occurred during her loading period. However, July 14, 1957, was a Sunday. Hence the correct figure for loading time should be 22 days and the total days to complete the voyage 38½.[1]

We do not think appellant is precluded from claiming this minor adjustment. The alleged stipulation was prepared at the end of the first day of the trial in response to the court's request that the parties endeavor to agree on certain facts. The transcript shows that when the trial resumed, a colloquy took place between the court and counsel which is reproduced in the margin.[2] We read this as

1. Plaintiff urged to the contrary testimony contended to show that loading time would be 10 days including some good and some bad. In fact the testimony related to unloading. In any event, under the charter defendant had the right to take 10½ weather working days to load; it is immaterial whether it might have been able to load in less.

2. "Mr. Cohn (for plaintiff): Your Honor, the parties have agreed on most of the items which were in dispute on Friday. I would like to hand this up. I don't have the original.

"Mr. Freehill (for defendant): I have agreed to stipulate these as estimated expenses they would have incurred if everything went well. In other words, they had no accidents at sea, they had no rain at the loading or discharging ports which would prevent the cargo being loaded or discharged.

"Mr. Cohn: This was not our understanding on Friday.

"The Court: Let me ask you this. This stipulation that you have shows the number of days of steaming time and you are agreeable to it?

preserving defendant's right to assert the voyage would have lasted longer than 37½ days if everything did not go well; certainly the contrary is not clear and our construction is borne out by plaintiff's lack of objection when, later in the trial, defendant called the court's attention to the entry in the log concerning the typhoon.

Making this adjustment, and also abandoning the division of the fuel costs into two categories for a special reason applicable to this case that will appear below, we come to a figure of $28,649.50 representing what plaintiff would have saved from non-performance of the charter if the JOSEFINA had remained idle in port. The stipulation showed that the total expenses of the cancelled charter (adjusted for the extra day) amounted to $86,784.50. Hence the expenses for items that would have been incurred regardless of performance amounted to $58,135. If the substitute charter had been for exactly the same period as the cancelled charter, we could find what contribution the substitute charter made to these general or "overhead" expenses by deducting from the freight under the substitute charter expenses of the same character as the $28,649.50 and determining what was left. However, the substitute charter was for 82 days, as against the 38½

"Mr. Freehill: That would be the estimated time if everything went well.

"The Court: Total days to complete the voyage would be 37½ days.

"Mr. Freehill: That is right. If everything went well.

"The Court: Do I take it, then, that it is agreed that the cost of completing that voyage would have been $85,131?

"Mr. Freehill: That is the estimated cost if everything went well.

"Mr. Cohn: These reservations of everything going well were not mentioned on Friday.

"The Court: All I want to know, is that the figure you are willing to take?

"Mr. Cohn: I am willing to accept it."

days of the cancelled charter, and the problem is to determine how much plaintiff received against the $58,135 of overhead expenses during those 38½ days.[3]

Some proration is clearly called for; the question is how this is to be done. Certain items of expense, such as crew wages and food, and maintenance of the vessel, accrue on a day-to-day basis; others, such as an indemnity that had to be paid to procure the charter, costs of loading and discharge, and Panama Canal dues, do not. In strict theory fuel costs should be divided between the minor costs that would be incurred in keeping the vessel in port, which should be prorated, and the excess costs entailed in having her at sea, as Judge Dawson did in the case of the cancelled charter. However, the record does not afford all the data required to make such a separation for the substitute charter; since the difference in result must be small, we will include all fuel costs with items of the sort just described. We think these items, amounting to $110,874, which are of the same general nature as those comprising the $28,649.50 of out-of-pocket savings deducted from the freight of the cancelled charter, should be deducted *in solido* from the freight of $152,310 under the substitute charter, that the balance of $41,436 should be prorated over the 82 days of the substitute charter, and that the quotient, $505.32, should be multiplied by 38½, resulting in a figure of $19,454.82 as earnings of the substitute charter applicable to the overhead expenses of 38½ days

3. In fact, the JOSEFINA did not reach Manila to load under the substitute charter until July 12. However, this delay appears to have been caused, not by requirements of the substitute charter but by the vessel's having remained in Japan for her own convenience. We shall therefore treat the substitute charter as if it had begun on the same date, July 10, that the cancelled charter was to have commenced.

and thus in further reduction of plaintiff's damages. Adding this $19,454.82 to the $28,649.50 figure of out-of-pocket savings already determined, and deducting the sum, $48,104.32, from the estimated freight of $121,740, we arrive at a figure of $73,635.68 of damages. This compares with the award of $98,616 made by the District Court.[4]

It might be argued by plaintiff that, since the substitute charter had to be performed as a whole, it is entitled to have the freight applied to the full payment not only of the non-proratable expenses but also of the proratable expenses for the last 43½ days, before any credit is given for the amounts earned against such expenses during the first 38½ days. On the other hand, it is argued that all expenses should be prorated, a method which, in most cases, including this one, would result in a smaller recovery. No rules in this field are "capable of exact and perfect application." 5 Corbin, Contracts (1951 ed.), §992. We think the method here adopted provides the fairest measure of the contribution made by the substituted charter to the overhead expenses the owner would have had during the corresponding period of the cancelled charter, and that this, along with the out-of-pocket expenses that were eliminated, was the "saving to the plaintiff due to the non-performance of the contract." Defendant claims it is entitled to a credit larger than we have allowed because of the contribution made by the substitute charter in getting the JOSEFINA to the United States, a voyage which she might have been obliged to make in ballast had the cancelled charter been performed.

4. Defendant's claim that depreciation should be computed as an expense of the cancelled charter need not be considered; for if it were so included, the same item would have to be included as an expense of the substitute charter and the two entries would wash.

Appendix A

We do not hold there are no circumstances in which a more favorable position of the vessel created by a substitute charter may be taken into account, cf. *Constantine & Pickering S.S. Co.* v. *West India S.S. Co.*, 231 Fed. 472 (S. D. N. Y. 1914); Poor, Charter Parties, 4th ed. p. 249; but in order to sustain this argument defendant was obliged to show that no cargo for the United States would have become available in late August when the cancelled charter would have been completed, and this burden it did not discharge. *Per contra*, if plaintiff had claimed the entire loss on the substitute charter as consequential damages, see 5 Williston, Contracts (1937 ed.), §1354, it would have had the burden of showing it could have obtained such cargo. However, no such claim was advanced. It is plain that if we look only at the period during which the two charters overlapped, the substitute charter made some contribution to the expenses of maintaining the vessel and thereby reduced rather than increased plaintiff's loss. There is thus no occasion to consider here the circumstances under which an owner may recover more than the charterer's performance and the rule in *Hadley* v. *Baxendale*, 9 Exch. 341 (1854).

There remains defendant's claim that, under clause 22 of the charter, "Dunnage and mats, and taxes, if any, to be for Owners account," deduction from the profit of the charter should be made for a "wharfage charge" of 2 pesos a metric ton imposed on the owner of certain exports from the Philippines, including raw sugar, under Section 3, Part II, of Republic Act No. 1371. It has been held that this levy, which goes back to 1909, although denominated a wharfage charge, in reality is an excise tax. *Sociedad Armadora A. P.* v. *7,020 Long Tons of Raw Sugar*, 122 F. Supp. 892 (E. D. Pa. 1954), affd. 223 F. 2d 417 (3d

Cir. 1955). While that consideration was decisive in the case cited, where the ship's liability was for "wharfage charges at both ends," it is not so here since the clause imposing liability on the ship refers to "taxes." Nonetheless we think the reference in the charter was to items such as port charges and loading fees imposed on the vessel and not to export taxes on the goods which, as the District Court pointed out, 178 F. Supp. 733, amounted to 8% of the gross freight. The charter was for a particular voyage from the Philippines and between parties evidently familiar with Philippine law; a reference to "taxes, if any" in a clause dealing also with dunnage and mats, was hardly apt language to impose liability on the owner of the vessel for a levy on the charterer's goods, of this nature and amount.

The judgment is modified to award plaintiff $73,635.68 with interest from July 10, 1957, and plaintiff's costs in the District Court, and as so modified is affirmed. Defendant shall recover half the costs of its appeal in this Court.

LUMBARD, *Chief Judge* (concurring in part and dissenting in part):

I am in full agreement with all of Judge Friendly's opinion for the majority except for that section which recomputes the damages to be assessed against the defendants. I would determine the damages by adding to the anticipated profits ($34,955.50) the actual loss incurred during the first 38½ days of the substitute charter ($33,680.18), allowing damages in the total amount of $68,635.68. Thus I differ from the opinion of the majority in two respects.

Appendix A

I

The majority assumes that the recoverable damages are to be measured entirely by the freight which would have been paid on the cancelled charter. It proceeds to compute the "saving" attributable to the breach by adding together (1) the amount which the plaintiff would have spent on the cancelled charter in excess of his cost of remaining idle in port and (2) the substitute charter's contribution towards the amount which would have been spent had the plaintiff stayed in port for the 38½ days of the cancelled charter. The latter figure is computed by first subtracting all the expenses in excess of in-port costs from the total freight of the substitute charter and then multiplying the remainder by the ratio that the time to be consumed by the cancelled charter bore to the time taken by the substitute. This sum is then subtracted from the freight that was due on the cancelled charter, and the remainder is awarded as damages.

However, the black-letter rule on contract damages, agreed upon by all authorities, is that they should be so measured as to put the plaintiff where he would have been had the contract been performed. See McCormick, Damages 137 (1935); 5 Corbin, Contracts 992 (1951). What should be awarded to the plaintiff is the value of performance, or, in other words, the anticipated benefit plus the negative or "reliance" interest. See 5 Williston, Contracts 1339 (1937); Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L. J. 52, 373 (1936). The Restatement of Contracts 329 says: "Where a right of action for breach exists, compensatory damages will be given for the net amount of *the losses caused and gains prevented* by the defendant's breach, in excess of savings made possible. . . ." (Emphasis added.)

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Hadley v. *Baxendale*, 9 Exch. 341 (1854), of course puts a ceiling on the recovery of losses. But if they were reasonably foreseeable at the time of contracting, then the plaintiff is entitled to have "not only assessment of gains prevented by the breach *but also of losses ensuing* which would not have occurred had the contract been performed." 5 Williston, Contracts p. 3764 (1937). (Emphasis added.) Had the defendant in this case been told by the plaintiff at the time they entered into the contract, with necessary detail, that a profitable charter awaited the plaintiff in Korea, the defendant could not have avoided liability for the loss of that profit if the breach prevented the plaintiff from reaching Korea.

If, as the majority suggests, damages are determined by matching the receipts of the substitute charter against the anticipated expenses of the cancelled one, damages could not exceed the original freight even if they were foreseeable. Moreover, even if such special foreseeable damages were included in the majority's formula as special expenses of the substitute charter, they would be only partially restored once the computation was complete.

The gain that was prevented by the breach was the anticipated net profit—the difference between the freight and the full stipulated cost of performing the cancelled charter. This amount, $34,955.59, is clearly recoverable in full

1. If, for example, it was proved that a $25,000.00 profit on a charter leaving from Korea was foreseen by the parties at the time of contracting and this figure were added to the substitute's special expenses, the total of expenses attributable to performance of the substitute would come to $135,874.00. This would leave, as a balance applicable to general expenses, $16,436.00. When prorated onto a 38½ day period, the allocated contribution would come to $7,716.04. This means that, under the majority's formula, $50,418.00 would be added to the anticipated profit instead of the present figure of $38,680.18. The plaintiff would, therefore, realize only $11,737.82 of his $25,000.00 loss.

under any computation of damages. What I would add to the anticipated profit is the loss incurred as a result of the breach.

In fact, the planned voyage was never made. Thus, the hypothetical allocation of expenses between those which would have been sustained in port and those attributable to travel is not only confusing and uncertain but also totally irrelevant. In addition to the lost profit, the breach caused an out-of-pocket loss insofar as it made necessary a loss charter; the substitute here was found to be reasonable by the district court. Since it was foreseeable that the cost of operating the ship would force the plaintiff to undertake a substitute charter, the defendant should be charged with whatever loss ensued from the substitute.

"A breach of contract may cause loss as well as prevent gain." Restatement, Contracts §339, comment g, and the breach in this case prevented a gain of $34,955.50 and caused a loss of the deficit on the substitute which amounted to $71,735.00. If the loss for all 82 days were added to the anticipated profit, the total recovery would be $106,790.00.

II.

We have in earlier cases, however, approved a prorating formula for determining profits made on a substitute charter which lasted beyond the period which was to be covered by the original. *United Transportation Co.* v. *Berwind-White Coal-Mining Co.*, 13 F. 2d 282 (2d Cir. 1926). Whether prorating is proper when it is a loss that is being accounted for is not entirely beyond controversy. However, the reason for crediting a defendant with merely a daily portion of a profit realized on a substitute contract such as that in *Berwind-White* seems equally persuasive in

the case of a loss. Just as it is too speculative to presume that beyond the period of the original charter, had it been performed, the plaintiff could not have made profits in excess of what he realized on the substitute, it is uncertain whether a plaintiff would not, in fact, have suffered greater losses than he did under the substitute if the original charter had been performed. Thus, I conclude that it is equitable to apply the prorating rule to the losses in this case, in view of the record before us.

The majority, however, would prorate only the "overhead" expenses of the type which would have been incurred had the plaintiff stayed in port. I cannot agree with the reasoning which results in such a calculation.

Several unexpressed premises underlie this computation. First, by drawing the line where he does, Judge Friendly assumes that a shipowner such as the plaintiff ordinarily bears overhead costs in an amount equal to the expenses of maintaining an idle ship. The facts of this very case, however, indicate that this is not true. When notified that the charter could not be performed, the plaintiff accepted a substitute, although it committed him to a daily out-of-pocket loss of over $800.00. The "overhead" of a ship is not at all like that of a haberdasher; it may be, as the stipulated figures regarding the cancelled charter indicate, the major portion of the cost to the shipowner of performing the service for which he is hired. Apparently, a shipowner whose vessel is unemployed in port for any substantial length of time suffers prohibitive losses, and it is more desirable for the owner to accept a losing charter which defrays some of the overhead costs than to wait idly in port. It is, therefore, erroneous to distinguish between the expenses incurred in port and the costs attributable to travel. To compute "savings" by

hypothesizing expenses had the ship not moved from its dock is to adopt an unrealistic contrast.

Second, the majority's computation cloaks an assumption that the non-overhead expenses of the last 43½ days of the substitute charter would not have been suffered had the original charter not been cancelled. As to fuel, this seems highly unlikely, since the ship might well have been employed elsewhere. Nor does it seem probable that other loading and discharge would not have been done. These expenses might, of course, have been balanced by freight payments for subsequent charters, but the entire computation is at best speculative. It is no more reasonable to assume that had the charter not been cancelled all later contracts would have been profitable ones than to assume that some might have resulted in losses.

Third, the classification of various items of expenditure into the overhead and non-overhead, or in-port and travel, categories involves the court in confusion and speculation. An accurate calculation would require, as Judge Friendly admits, that fuel costs for the stay in port be classified as overhead. Moreover, the majority assumes that the other overhead expenses would be the same in port as at sea, and speculates as to the allocation of the total daily expense figure of $1,510.00 provided for in the stipulation. If there were no stipulation, the majority's decision here would require the district court to decide not only what the total expense of the cancelled charter would have been, but to allocate the hypothetical figures by determining—at a second hypothetical remove—what would have been spent had the ship stayed in port.

I would, therefore, compute the daily loss on the entire substitute charter just as did the commissioner in *Berwind-White* with regard to daily profits. When multiplied by

the 381/2 days for which the original charter is accountable, the total prorated loss comes to $33,680.19. This sum should be added to the anticipated profit for a damage figure of $68,635.69, almost $5,000.00 less than the majority's award. In an area in which the computation of damages is, as Judge Friendly concedes, approximate at best, this method has the merit of simplicity and avoids the hairline distinctions between overhead expenses and those which would have been incurred "regardless of performance."

It might appear anomalous that this dissenter, while objecting to the majority's formulation as too restrictive from the plaintiff's point of view, would emerge with a damage award smaller than that of the majority. However, this result follows from the fact that the substitute charter was undertaken for a period considerably longer than that which was planned under the cancelled charter, and from the rule requiring us to prorate the loss.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of December one thousand nine hundred and sixty.

Present: Hon. J. EDWARD LUMBARD, *Chief Judge*,
Hon. ELBERT P. TUTTLE,
Hon. HENRY J. FRIENDLY,
Circuit Judges.

LIBERTY NAVIGATION AND TRADING CO. INC.,
Plaintiff-Appellee,

v.

KINOSHITA & CO. LTD., TOKYO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is modified to award appellee

$73,635.68 with interest from July 10, 1957, and appellee's costs in said District Court, and as so modified said judgment be and it hereby is affirmed with half the costs to the appellant in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

(Seal)

A true copy.

A. Daniel Fusaro
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of February, one thousand nine hundred and sixty-one.

Present: Hon. J. EDWARD LUMBARD, *Chief Judge*;
Hon. HENRY J. FRIENDLY,
Circuit Judges.

LIBERTY NAVIGATION & TRADING CO., INC.,
Plaintiff-Appellee,
v.
KEISHITA & CO., LTD., TOKYO,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk